

SOME THOUGHTS ON JURY SELECTION

BY DAVE POWELL

FINDING THE “OUTLIERS”

BACKGROUND: The importance of jury selection is often minimized and misunderstood. I have been picking juries since 1982 and for many years, I really did not understand what I was doing or why. An awakening to my lack of understanding came as a Prosecutor during individual jury selection in a highly public murder trial. Trial defense counsel had hired a well-known jury consultant to assist the defense. I had more than a hundred jury trials under my belt. I believed I was a competent Prosecutor. A jury was selected, the trial began and two days into my case the defense counsel approached me and negotiated a guilty plea for the defendant. Prior to trial the defense had expressed no interest in a guilty plea. After the change of plea I asked defense counsel why the change of heart? He said his jury consultant advised him that I had picked a jury that would convict. I had not expected that answer, and I had questions for the jury consultant. My subsequent discussions with the jury consultant, study of written materials on jury selection and application of what I learned changed the way I prepared for and selected a jury.

INTRODUCTION: I developed a jury selection method that worked for me as a Prosecutor. My method is not that complicated. The good news is that as a rule about 70% of the population will always work for you as jurors. That is probably why competent Prosecutors who do nothing more than review the court’s jury questionnaire end up with juries that convict. However, if you have ever had a hung jury after a long trial and faced the hard work of trying a case for a second time, then you likely had an *outlier* juror or two on your jury. Essentially, during your analysis of prospective jurors you are searching for those potential *outliers* or that 30% who may train wreck deliberations. If you ask the right questions *outliers* reveal themselves. Once you have identified these *outliers* or problem jurors challenge them. If you cannot challenge them for cause, then you use your peremptory challenges to remove them. Some of your questions (written or oral) should be designed to identify *outliers*.

Before I discuss the *Outlier* Discovery Process, let me offer some Do’s and Don’ts of Jury Selection.

YOU SHOULD ALWAYS DO

1. Put yourself in the position of the juror. Outside of parenthood, there is no other parallel in a citizen’s life where a judgment or decision has such life changing consequences for another human being. Jurors have a very sobering and difficult responsibility – do not ever fail to appreciate that. If you genuinely care about them (and you should), jurors will see that in your body language and demeanor. Almost all jurors show up with no previous experience with the criminal jury trial process. They only know what they have seen on TV. Do not rely on the Judge to explain the process to them. Explain the trial process to them during jury selection and make sure they understand it. I always instruct them to raise their

- hand if they have questions or concerns and the Court, sometimes with the help of the attorneys, will assist them.
2. Tell them you care about justice. You want the defendant as well as the State to have a fair trial.
 3. Tell them not every case is suited for every jury, and that is one of the reasons you have to speak with them. It is the only time during the trial that you and the jurors can talk directly to one another. If they want you to know something, then this is the time for them to speak. Tell them you may ask questions that are difficult or embarrassing, but it is your duty to make sure the trial is fair.
 4. Explain there is no right or wrong answer to your questions, jury selection is not like a classroom exam. You are simply trying to get to know them, in the time allotted, with the goal of selecting the jurors best suited to evaluate this case. Tell the jurors to raise their hand if they cannot hear a witness, see an exhibit/visual aid, or if someone is blocking their view. If you tell them it is okay, then they will follow this instruction. I have had jurors tell me I was blocking their view.
 5. Prepare your questions or thoughts beforehand. Use written supplemental questionnaires in your major, critical or high publicity cases. I used supplemental written questionnaires in all murders and most Class A felony cases. Ask open ended questions and know what answers you are looking for.
 6. Use simple language, be polite, and respectful. Always maintain eye contact with them when they are speaking or you are speaking to them. Avoid any temptation to look at your notes while a juror is responding. The quickest way to turn a juror off is to send a message that you are not interested in them by reviewing your notes while they respond to your question.
 7. Always refer to them by Juror # and Mr./Mrs. (last name). No first names.
 8. When I ask questions of the group, I tell them to shake their head yes or no, if an affirmative or negative response is appropriate. I then answer for the group “affirmative response by all jurors” or “negative response by all jurors”. I tell them that if I answer incorrectly for them as an individual they should raise their hand and correct me, so that we can discuss their individual answer and why it differs from the rest of the group. The record must reflect how jurors answer even as a group.
 9. Make sure someone at your table is writing down every answer given by a juror. You do not have time to do this. Require your detective or an assistant to do this. I recommend you create individual juror forms for this. The juror’s answers will help you in ways other than jury selection. They should record how the juror is dressed and do their best to describe the juror’s demeanor (body language).
 10. Make sure the voir dire is recorded.
 11. Jurors will not always tell the truth in open court. They are usually more truthful in a confidential written questionnaire especially when providing confidential or sensitive information.
 12. Lastly, always score or grade your jurors before you start. A good written supplemental questionnaire allows you to identify your good and *outlier* jurors prior to trial. When a written questionnaire is used, you will want to use oral questioning, in part, to confirm your juror scores and ratings. I require co-counsel and investigating officers to score the jurors as well. We will usually meet the

night before trial and hammer out our final juror grades. Often a consensus is reached; however, chief trial counsel must always reserve the right to make the final grade.

13. Finally, trust your instincts. If something does not feel right about a juror, then despite persuasion to the contrary, go with you gut.

YOU SHOULD NEVER

1. Never demean, embarrass or argue with a juror.
2. Never talk down to a jury or above their heads, most jurors already believe you are smarter than they are.
3. Never reveal negative information from their questionnaire, do not emphasize it. If other jurors see you embarrassing or picking on a juror, they will be less responsive and open.
4. Never talk about yourself, do not apologize, make excuses, the case is not about you. The happiness and well being of the juror should be your main concern. Never forget they are the decision makers, and it is your job to make them comfortable with their decision.
5. Never try to be funny. If something spontaneous happens that is funny, it is certainly okay to laugh or react naturally.
6. Never concentrate on one juror; spread your questions around and involve everyone.
7. Never be casual or disrespectful with the trial judge (even if you cannot stand them). Always show proper respect for the bench. You want the jury to follow his/her instructions. I always ask permission from the trial judge before I speak, approach the bench or a witness, retrieve an exhibit, conduct a demonstration, or display/pass an item to the jury.
8. Never be late or unprepared. You owe it to everyone in the room and especially to the citizens of your community to be ready.
9. Never assume jury selection is not critical. You can win, lose or hang a case in jury selection.
10. Never forget it is your responsibility to meet the burden of proof. A good jury will acquit if you fail to meet your burden. Hanging juries are figment of a prosecutor's imagination.

OUTLIER DISCOVERY PROCESS

The perfect jury. Perfection is rarely possible in jury selection; however, you can come close. The perfect jury consists of followers and leaders. The best jury makeup for a prosecutor is 80-90% followers, team players, and 10-20% leader or foreperson candidates. You want a group when the trial is over that have made friends for life, or may even hold a reunion to preserve their positive experience together. This kind of jury is possible in every trial when you discover and remove that 30% percent of the population, I call *outliers*. Jurors receive two scores from me: first, a numerical 1 thru 5 with 1 being the best and 5 the worst; and second, a color score, Blue, Green, Red or

Yellow (blended colors such as Blue with Green tendencies are possible), Red and Yellow are unacceptable color scores (*outliers*).

Grading Jurors by Number. I use a 1 to 5 grading system for all jurors. A juror with the number 1 is the *perfect* juror. They are rare. Scores of 4 or 5 and colors of red or yellow must be removed either for cause or peremptorily. Most jurors that you get to keep are scored 2 for *good* or 3 for *average*. It has been my experience that jurors who score 1 are usually preempted by the defense. As a Prosecutor you never want a jury with a juror you scored as 4 or 5. A jury consultant can often help you identify jurors that will be good for you or bad for you. They can also help evaluate your voir dire questions and/or suggest voir dire questions that will help you find the best jurors among those available. Some jurors are obvious 4 and 5s. If you look at the juror and think to yourself I would not want to sit next to that person for the next several days, then they need to go. No matter how bad they want to serve, if they have physical or health problems that will burden or distract the other jurors, they need to go. If they have any mental health issues, they need to go. If they are unsightly, unclean, extremely overweight, emaciated, or badly groomed, they need to go. If they have body language, or ticks that are distracting or offensive, they need to go. After you review, the standard questionnaire and hopefully a written supplemental questionnaire you should assign them a number. You can adjust the number up or down if necessary during voir dire. Your goal should be to get jury with as many 2s as possible. 1s are great, but not often achieved and you can live with a 3.

Grading Jurors by Color. Blues make up approximately 58% of the population, Greens 12%, Reds 16% and Yellows 8% (Dr. James Rasicot, *New Techniques for Winning Jury Trials*, 1990, pages 159-160). Color psychology theories have been around for more than 50 years. Dr. James Rasicot introduced this concept to me when he spoke at an IPAC winter conference many years ago. He discusses color psychology and jury selection in chapter 4 of his book *New Techniques for Winning Jury Trial* (1990). In practice I have found the color psychology theory for grading jurors to be accurate and helpful. I re-read his chapter on Voir Dire prior to every trial and I copy and insert the general personality trait color charts found at pages 167-170 of his book in the jury selection section of my trial notebook. I spoke to Dr. Rasicot and he emphasized that concepts discussed in his 1990 book still apply to jury trials today. I agree.

It is a simple matter to ask jurors to tell you: 1. What they prefer to do when not working; 2. What do they like to read, if they get to read; 3. What types of television shows they watch; and 4. Their membership in groups, clubs or associations. All of these questions are important. You certainly do not need to ask questions to read their body language, evaluate their appearance, dress or personality. If you can obtain this type of data/information from each juror then you can assign to each juror a color that reflects certain general personality traits. Using Dr. Rasicot's color code, I will assign a color (blue, green, red or yellow) to each juror.

Remember the personality type, not the color, that the color represents is what is important to you. It is relatively simply to find jurors that fit within the

Supportive/Compromising or Blue personality group. Blues like working in groups, enjoy being around other people, and helping others. They are people you want working for you or with you; they are interested in you and what you have to say. They rally around and respond to good leadership. Assuming your Blue grades 1, 2 or 3 then your jury should include 8 to 10 of these personality types. Remember, Blue personality types are not foreperson (leader) candidates.

You need 2 to 4 foreperson (leader) candidates on each 12 person jury. Greens are about 12 % of the population and can be confused with a Red personality type if you are not careful. Greens are analytical and status minded; they are often obvious leaders; they are typically active members in important and selective organizations (Rotary, Chamber of Commerce, etc.). They tend to be highly educated, serious, rule followers. They are interested in self-improvement. Blues will look to Greens for leadership and they are a combination that works well together for prosecutors. Greens are collaborative leaders – they want to make good decisions.

Reds often come across very directly and you may be misled into thinking they will be strong for you. Reds are about 16 % of the population; they tend to be dominant and very independent. A Red will take on the whole room and is often difficult to work with in a group setting. They do not care what others think; it is my way or the highway with a Red. A big difference between a Red and Green is that Red's will have a short attention span versus a Green who will take the necessary time to study a problem. Reds are more trouble than they are worth. I always try to identify them and remove them. Because of their aggressive personality they are often easy to remove for cause. Reds see themselves as leaders – they are really dictators.

Yellows simply cannot make a decision. They tend to be very emotional and free thinking. They will buy any argument. They are often overly optimistic. If you have a hung jury where one or two jurors simply cannot decide, then you will generally find this personality type. Yellows tend to be artistic. Yellows need to be identified and removed or expect a lengthy and unproductive deliberation.

Reds and Yellows are outliers that prosecutors do not want on their juries.

I assign each juror a color along with their number. Again, Reds and Yellows are excused no matter their number score. Essentially, you do not want 4s, 5s, Reds, or Yellows on your jury. You do want a strong group of Blues (1, 2 or 3) and a few Greens (1, 2, or 3).

Once you have identified the outliers, you can work to get rid of them. Dr. Rasicot's book and other personality profilers using color psychology provide far greater detail on this subject. My comments are a summary designed to generate interest and further study.

PLANTING SEEDS AND BUILDING RAPPORT

Planting Seeds. You should also spend some time during Voir Dire to plant seeds with the prospective jury. At this point you have given your mini-opening and the judge has read the information to the jury. The jurors should know why they have been summoned. Ask some questions to determine if jurors have a bias or strong opinions about the offenses charged. Some people react strongly to sex crimes, others think drugs should be legal. I always ask them how they feel about the crimes charged and whether they agree these crimes, if proven, should be enforced by jurors in our state. If you have difficult witnesses, such as those who are testifying under immunity or plea deals, then you should elicit juror feelings about witnesses with deals. Obviously, if the case is high profile you need to cover the pretrial publicity. If you have complicated or unusual legal issues (i.e. conspiracy or accessory charges) that will be covered by jury instructions, then spend some time making sure the jurors will follow the court's instructions. Remind them to ask for clarification if they become confused by an instruction. I always mention reasonable doubt and make sure jurors understand that reasonable doubt does not mean proof beyond all doubt. "The State cannot prove beyond all doubt the sun will rise in the morning" do you understand to hold the State to such a burden is not proper or lawful?

Building Rapport. When you finish voir dire the jury should clearly understand how important they are to you, that you care about them, and they should view you as a trusted source for information and guidance. They should understand that you are only interested in the truth and following the law. Ask them to be fair to the defendant. They must not convict the defendant unless, the People prove each and every element beyond a reasonable doubt. Ask them to understand that the defendant has an absolute right to not to testify as do all citizens. If the defendant elects not to testify, they must not hold the defendant's failure to testify against him/her. I explain the deliberative process and then question them to make sure they know what is expected of them. I ask them to respect one another and to listen to one another. I ask them to agree that 12 people make a better decision than 1 or 2. If a juror refuses to deliberate, then tell them how to notify the bailiff, and I make sure they all agree to do this. Make sure they understand they must not involve themselves with penalty discussions. Discuss the defendant's constitutional right to confront witnesses and how it would be wrong, a violation of the defendant's right to confrontation, for them to attempt to conduct outside research or bring new information into the deliberations. When I am done, quite simply I want them to trust me.

WRITTEN SUPPLEMENTAL QUESTIONNAIRES

Why use them. They work and they are often more reliable than regular oral voir dire. Years ago, when I first proposed using a supplemental written juror questionnaire to my circuit court judge he balked. We were preparing for a murder trial that had received a great deal of pretrial publicity. We had tried a similar high profile murder earlier that year and individual voir dire on the issue of publicity took almost an entire week. Prior to the trial I met with a jury consultant and together we developed a set of questions that I believed would eliminate the need for lengthy individual voir dire on pretrial publicity. I

sent the proposed questions to the defense counsel and told them to add any questions they wanted. They added a couple and we submitted the proposed supplemental questionnaire jointly. The judge complained that his staff did not have the time to copy or money for postage to mail the questionnaire. It was thirty pages long. The judge felt it was just too much work. I told him my staff would do all of the work and we would pay for the postage if he would just give it a try. He was skeptical but he reluctantly agreed. Plus he did not want to spend 5 days in individual voir dire again. We sent the questionnaire out a month before the trial and they were returned to the court in sufficient time for us to get our copies and discuss then at a final pretrial two weeks before the trial start date. The questionnaire allowed us to sort out almost all jurors that were conflicted by publicity or had obvious conflicts. With the help of the questionnaire the actual jury selection process was completed in half a day versus 5 days. The written questionnaire was such a positive experience, that they became a standard part of our practice in all major cases (murders and some A felonies).

A properly prepared supplemental questionnaire allows you to essentially pick the jury prior to voir dire. I am also confident that once your trial judge understands how effective they are he/she will welcome them. Jurors will be more truthful as well. We had a prospective female juror report that she had been a victim of a sex crime when she was 12. She said she had never told anyone. She asked us to keep her answer confidential and reported that she would deny being a victim if asked in the courtroom. The parties would have never known the truth from this juror if we had not used the written questionnaire.

If you have a pending major case, that is important to you, one you cannot lose, then a written questionnaire can be a valuable tool in your preparation.

In your 2014 conference materials are two sample questionnaires for your consideration. I prepared some potential oral Voir Dire Questions plus a sample written supplemental questionnaire. Hopefully, they will provide some insight into the value of thoughtful Voir Dire preparation and the worthiness of a juror consultant's input.

The last thing any prosecutor wants is a jury that does not trust him/her, will not work together, and cannot reach a decision. I am confident that if you take the time to understand the above process that you will not face that jury.

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